Supreme Court, U.S.
FILED
DEC 28 1998
OFFICE OF THE CLERK

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOE SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,

Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,

Respondents.

CORRECTED COPY

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONERS

RICHARD A. CORDRAY
Counsel of Record
ANDREW B. CLUBOK
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether law enforcement officers violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant?

2. Whether, if this action violates the Fourth Amendment, petitioners are nonetheless entitled to a defense of qualified immunity?

PARTIES TO THE PROCEEDING

The petitioners in this case are all federal employees who have been sued in their individual capacity. Petitioners Rodney Hanlon, Joel Scrafford, Richard C. Branzell, and Rodney Prieksat are special agents of the United States Fish and Wildlife Service in the Department of the Interior. Petitioner Kris A. McLean is an Assistant United States Attorney for the District of Montana. Petitioners are defendants in this case and were appellees in the court below. Petitioners are all individuals, and thus there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

Paul W. Berger and his wife Erma R. Berger are the plaintiffs in this case and were the appellants in the court below.

The United States of America is also a defendant in this case, having been substituted as a party for purposes of the claim of trespass asserted originally against Kris McLean, but is not a party to the case before this Court.

Also named as defendants in this case were Turner Broadcasting Systems, Inc. ("TBS"), the parent company of Cable News Network, Inc. ("CNN"), and two CNN employees, Robert Rainey and Donald Hooper. A separate lawsuit was filed by respondents against CNN itself and against Jack Hamann, another of its employees. Those cases were treated together for purposes of the appeal, and all of these defendants were appellees in the court below. The Supreme Court Clerk's office has indicated that all of these individuals and entities are parties to the case before this Court, and are to be denoted as "respondents in support of petitioners."

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

A. The Fish and Wildlife Service Investigation 3

B. The Execution of the Search Warrant 5

C. The District Court Proceedings 6

D. The Decision by the Court of Appeals 8

SUMMARY OF ARGUMENT 9

ARGUMENT 10

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM AND TO OBSERVE AND RECORD THEIR EXECUTION OF A WARRANT 11

A. The Warrant Was Valid and Was Issued by a Court upon a Showing of Probable Cause 11

TABLE OF CONTENTS
(continued)

PAGE

B. The Officers Properly Executed the Warrant to Search the Ranch for Evidence of Crimes 13

C. The Members of the News Media Did Not Actively Participate in Executing the Warrant and Did Not Conduct Any Search or Seizure 14

D. The Fourth Amendment Permits Officers Who Are Executing a Warrant to Allow Third Parties to Accompany Them to Aid in Discharging Their Law Enforcement Mission 18

E. The Common Practice of Allowing News Media to Accompany Officers and to Observe and Record Their Conduct Is Reasonable and Helps to Facilitate Effective Law Enforcement 22

F. In This Case, It Was Reasonable for Petitioners to Allow Members of the News Media to Accompany Them and Observe and Record Them Executing the Search Warrant 26

G. Any Improper Intrusion or Disclosure by Officers or Others Can Be Redressed Under the Common Law Without Creating an Additional Basis for Suppressing Evidence 29

TABLE OF CONTENTS
(continued)

PAGE

II. IF THE COURT HOLDS HERE FOR THE FIRST TIME THAT SUCH CONDUCT VIOLATES THE FOURTH AMENDMENT, PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED AT THE TIME THEY ACTED ... 32

A. Officials Are Shielded from Personal Liability by the Defense of Qualified Immunity Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law 33

B. At the Time Petitioners Acted, Courts Uniformly Held that the Constitution Allows Officers to Permit News Media to Accompany Them to Observe and Record Their Execution of a Warrant, and Justice Department Policy Endorsed the Practice 36

C. At the Time Petitioners Acted, No Court Had Ever Held that Their Conduct Violated the Fourth Amendment and Hence They Are Entitled to Qualified Immunity 40

D. It Has Long Been Common Practice to Allow News Media to Accompany and Observe Officers' Law Enforcement Activities 42

E. Relevant Decisions and the Debate in this Case Show that It Is Not Apparent, Even Now, that Petitioners Violated the Fourth Amendment 44

CONCLUSION 48

TABLE OF CONTENTS
(continued)

PAGE

APPENDIX:

U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII (Assisting the News Media) (as amended Jan.14, 1993, and as amended May 3, 1993) A1

TABLE OF AUTHORITIES

PAGE

Cases

Anderson v. Creighton, 483 U.S. 635 (1987) ..... *passim*
Anderson v. WROC-TV, 441 N.Y.2d 220 (Ct. App. 1981) 22, 30, 43
Arizona v. Hicks, 480 U.S. 321 (1987) 16, 17
Associated Press v. NLRB, 301 U.S. 103 (1937) 26
Avenson v. Zegart, 577 F. Supp. 958 (D. Minn. 1984) ... 36
Aversa v. United States, 94 F.3d 1200 (1st Cir. 1996) 23
Ayeni v. CBS, 848 F. Supp. 362 (E.D.N.Y. 1994), *aff'd*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995) 40
Ayeni v. Mottola, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995) ..... *passim*
Baker v. Howard, 419 F.2d 376 (9th Cir. 1969) 32
Bills v. Aseltine, 52 F.3d 596 (6th Cir. 1995) 46, 47
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) ..... *passim*
Branzburg v. Hayes, 408 U.S. 665 (1972) 26
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) 25
Buonocore v. Harris, 65 F.3d 347 (4th Cir. 1995) ... 15, 22
Butz v. Economou, 438 U.S. 478 (1978) 33
Chew v. Gates, 27 F.3d 1432 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (1995) 39
Commonwealth v. Farrar, 413 A.2d 1094 (Pa. Super. 1979) 19
Commonwealth v. Sbordone, 678 N.E.2d 1184 (Mass. 1997) 21
Crawford-El v. Britton, 118 S. Ct. 1584 (1998) 27, 33
Crowder v. Sinyard, 884 F.2d 804 (5th Cir. 1989) 20
Dalia v. United States, 441 U.S. 238 (1979) 18, 19
Davis v. Scherer, 468 U.S. 183 (1984) 33, 34, 47
Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971) ... 31
Elder v. Holloway, 510 U.S. 510 (1994) 34

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Florida Publishing Co. v. Fletcher, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977) 23, 42, 43
Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 33
Hagler v. Philadelphia Newspapers, Inc., 1996 WL 408605, Civ. No. 96-2154 (E.D. Pa. July 12, 1996) .. 46
Harlow v. Fitzgerald, 457 U.S. 800 (1982) ..... *passim*
Higbee v. Times-Advocate, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980) ..... *passim*
Hunter v. Bryant, 502 U.S. 224 (1991) (per curiam) 42
Katz v. United States, 389 U.S. 347 (1967) 21
Kelley v. State, 315 S.E.2d 916 (Ga. App. 1984) 20, 28
Lopez v. United States, 373 U.S. 427 (1963) 15, 17, 27
Magenis v. Fisher Broadcasting, Inc., 798 P.2d 1106 (Or. App. 1990) 22, 31
Malley v. Briggs, 475 U.S. 335 (1986) ..... *passim*
Michigan v. Summers, 452 U.S. 692 (1981) 18, 21, 26
Miller v. NBC, 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986) 22, 30
Mitchell v. Forsyth, 472 U.S. 511 (1985) ..... *passim*
Moncrief v. Hanton, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984) ..... *passim*
Ohio v. Robinette, 117 S. Ct. 417 (1996) 24, 28
On Lee v. United States, 343 U.S. 747 (1952) 15
Parker v. Boyer, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997) 8, 41, 45
Paul v. Davis, 424 U.S. 693 (1976) 39
Pennsylvania v. Mimms, 434 U.S. 106 (1977) 18
People v. Boyd, 474 N.Y.S.2d 661 (Sup. Ct. 1984) 24
People v. Superior Ct., 598 P.2d 877 (Cal. 1979) 19
People v. Turner, 57 Cal. Rptr. 854 (Ct. App. 1967) 20

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

Prahl v. Brosamle, 295 N.W.2d 768 (Wis. App. 1980) ..... *passim*
Procunier v. Navarette, 434 U.S. 555 (1978) ..... *passim*
Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) 25
Rogers v. Buckel, 615 N.E.2d 669 (Ohio App. 1992) 22, 31
Scheuer v. Rhodes, 416 U.S. 232 (1974) 47
Scott v. State, 559 So. 2d 269 (Fla. App. 1990) 22, 38
Scott v. United States, 436 U.S. 128 (1978) 27
Stack v. Killian, 96 F.3d 159 (6th Cir. 1996) 21
State v. Klosterman, 317 N.W.2d 796 (N.D. 1982) 19
State v. Wade, 544 So. 2d 1028 (Fla. App. 1989) 19
Sullivan v. Town of Salem, 805 F.2d 81 (2d Cir. 1986) ... 39
Taylor v. KTVB, Inc., 525 P.2d 984 (Idaho 1974) 25
Texas v. Brown, 460 U.S. 730 (1983) 16
The Florida Star v. B.J.F., 491 U.S. 524 (1989) 32
United States v. Caceres, 440 U.S. 741 (1979) 15
United States v. Clouston, 623 F.2d 485 (6th Cir. 1980) (per curiam) 15, 20
United States v. Dellinger, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972) 40
United States v. Hubbard, 493 F. Supp. 209 (D.D.C. 1979) 24
United States v. Jacobsen, 466 U.S. 109 (1984) .. 16, 17, 21
United States v. Karo, 468 U.S. 705 (1984) 17
United States v. Lanier, 117 S. Ct. 1219 (1997) 47
United States v. Medlin, 842 F.2d 1194 (10th Cir. 1988) . 22
United States v. Nicholson, 17 F.3d 1294 (10th Cir. 1994) 28

TABLE OF AUTHORITIES
(continued)

PAGE

Cases

United States v. O'Neal, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972) 40
United States v. Ramirez, 118 S. Ct. 992 (1998) 18, 29
United States v. United States Dist. Ct., 407 U.S. 297 (1972) 40
United States v. White, 401 U.S. 745 (1971) ..... *passim*
United States v. Wright, 667 F.2d 793 (9th Cir. 1982) ... 15
United States Dept. of Defense v. FLRA, 510 U.S. 487 (1994) 24
Wallace v. King, 626 F.2d 1157 (4th Cir. 1980), *cert. denied*, 451 U.S. 969 (1981) 39
Weeks v. United States, 232 U.S. 383 (1914) 16
Wilson v. Layne, 110 F.3d 1071 (4th Cir. 1997), *aff'd*, 141 F.3d 111 (1998) (en banc), *cert. granted*, No. 98-83 ..... *passim*
York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964) 32

Constitutional Provisions, Statutes, Rules, Policies

U.S. CONST. amend. IV ..... *passim*
7 U.S.C. § 136j(a)(2)(G) 5
18 U.S.C. § 3105 ..... 13, 17
28 U.S.C. § 1254(1) 3
28 U.S.C. § 2679(d)(1) 30
Fed. R. Crim P. 41 ..... 12, 28
U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII (Assisting the News-Media) (as amended Jan.14, 1993) ... *passim*

TABLE OF AUTHORITIES
(continued)

PAGE

Other Authorities

MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW (5th ed. 1995) 44
RESTATEMENT (SECOND) OF TORTS § 652 ..... 25, 30, 31
Richard Zoglin, *Live on the Vice Beat*, TIME, Dec. 22, 1986, at 60 42

No. 97-1927

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RODNEY C. HANLON, JOEL SCRAFFORD, KRIS A. MCLEAN, RICHARD C. BRANZELL, and ROBERT PRIEKSAT,
Petitioners,

v.

PAUL W. BERGER and ERMA R. BERGER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONERS

INTRODUCTION

The Court has granted *certiorari* in this case and in the companion case of *Wilson v. Layne*, No. 98-83, and has directed the parties to brief both the underlying Fourth Amendment issue and the qualified immunity issue.

In addressing the first of these questions, it is important for the Court to recognize that its ruling on the Fourth Amendment issue is one of first impression. As many lower court judges have observed, the proper resolution of that issue is not clear-cut, one way or the other, based on doctrine, tradition, or precedent. Petitioners in this case are entitled to invoke the

defense of qualified immunity against respondents' claims of personal liability for money damages because the contours of any such right under the Fourth Amendment -- however the Court may rule in this case *de novo* -- were not "sufficiently clear that a reasonable official would understand that what he [was] doing [in March 1993] violate[d] that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, the Court should uphold qualified immunity here on the same basis as it did in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985).

At the time petitioners acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that such conduct was unlawful. Indeed, the only lower courts that had addressed the issue had upheld the lawfulness of allowing news media to accompany officers and to observe and record their execution of a warrant. In the years since, judges have repeatedly disagreed about whether this conduct violates the Fourth Amendment at all, and they have found no precedent whatsoever that had "clearly established" such a violation at the time that petitioners acted. In these circumstances, the Court should reaffirm its sound admonition that public officials are entitled to qualified immunity where they "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 129 F.3d 505 (1997), and is reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at 1a-26a. The District Court's opinion and order granting summary judgment for petitioners is unreported (except as *Berger v. Hanlon*, 24 Media L. Rep. (BNA) 1757 (D. Mont. 1996)), and appears at Pet. App. 27a-47a. The Ninth Circuit's order denying a petition for rehearing and suggestion for rehearing *en banc* appears at Pet. App. 48a.

STATEMENT OF JURISDICTION

The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc* on February 25, 1998. Pet. App. 48a. Petitioners filed a timely petition for *certiorari* on May 26, 1998. The Court granted the petition on November 9, 1998, and consolidated this case for argument with *Wilson v. Layne*, No. 98-83. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

STATEMENT OF THE CASE

A. The Fish and Wildlife Service Investigation.

This lawsuit stems from an investigation of respondents by the United States Fish and Wildlife Service in the Department of the Interior. The investigation occurred after federal officials received complaints and information from state wildlife officials and former employees of the Bergers, who indicated that Mr. Berger was violating federal law by using poisons to kill predators on his ranch, including eagles. Pet. App. 4a. The investigation led to criminal charges against Mr. Berger, who was convicted on one charge of using a registered pesticide (Furadan) in a manner inconsistent with its labeling, which is a federal crime. *Id.* at 7a.[1]

Petitioners in this case are four special agents of the United States Fish and Wildlife Service in the Department of the

---

[1] The facts alleged in the criminal information were that Mr. Berger laced sheep carcasses with Furadan, with the intent of killing predators, including eagles. Pet. App. 7a.

Interior and an Assistant United States Attorney who helped to plan and participated in the investigation. In the course of their investigation, they learned that Mr. Berger had allegedly poisoned or shot numerous eagles on his ranch over the years. Pet. App. 4a. In an effort to obtain evidence concerning these allegations, petitioners sought a warrant to search the Bergers' ranch, which covers about 75,000 acres in Montana. In response to their application, a federal magistrate judge issued a search warrant for the Berger ranch, which authorized the search of the ranch and all appurtenant structures, excluding the residence, for evidence indicating the illegal taking of wildlife. *Id.* at 5a. The reasonableness and validity of the search warrant has never been in question in these proceedings.[2]

Shortly before the federal agents applied for the warrant, they had been approached by employees of Turner Broadcasting System (TBS) and Cable News Network (CNN) to discuss whether an arrangement could be worked out to allow them to accompany the federal agents and observe and report on their conduct in executing the warrant. The court below described their respective objectives as follows: "The media wanted footage for their environmental programs and the government wanted to publicize its efforts to combat environmental crime." Pet. App. 4a.

After some discussion of the matter, petitioner Kris McLean, the Assistant United States Attorney in charge of the Berger investigation, ultimately reached a letter agreement with an employee of CNN, confirming that the Office of the United States Attorney for the District of Montana would allow CNN to accompany federal agents "as they attempt to execute a criminal search warrant near Jordan, Montana, some time during the week of March 22, 1993." Pet. App. 4a. The parties

---

[2] Petitioners also applied for and obtained seizure warrants for two trucks owned by Mr. Berger, which were executed on the same day that the search was conducted. *See* J.A. 28-43; Excerpts of Record (in the Court of Appeals) (hereafter "E.R.") Tab 5, Exh. G. The courts below followed the Bergers' complaint by focusing solely on petitioners' execution of the search warrant. *See* Pet. App. 28a; *id.* at 9a-10a.

specifically contemplated that CNN would shoot video footage of the agents' attempt to execute the search warrant, but place the videotape under embargo until the parties could be certain that its broadcast would not affect any resulting criminal proceedings before a jury. *Id.* at 4a-5a. Each of the parties complied with the terms of this agreement in all respects.

B. The Execution of the Search Warrant.

On the morning of March 24, 1993, a team of federal law enforcement officers, accompanied by the assistant federal prosecutor and a CNN media crew, proceeded to a point near the Bergers' ranch. The officers were audiotaped and videotaped by the media crew at all times. Mr. Berger met them on the road leading up to the ranch. The officers informed Mr. Berger that they were there to execute a search warrant, and he took them up to his residence. Mr. Berger consented to a request to enter, and they entered the house to explain to Mrs. Berger what the officers were doing there. Pet. App. 6a.

Over the course of the day, the officers searched the ranch and its outbuildings pursuant to the authority conferred by the search warrant. The CNN media crew and the assistant prosecutor accompanied and observed the officers, and the media crew recorded the officers' conduct in executing the warrant. The assistant prosecutor and the media crew, however, did not actively participate in the search for evidence and did not seize any tangible items. Pet. App. 36a.

The evidence gathered by the law enforcement officers later served as a basis for the federal prosecution of Mr. Berger. Kris McLean, the Assistant United States Attorney who had accompanied the officers in their search of the ranch, served on the prosecution's trial team. In that proceeding, Mr. Berger filed a motion to suppress, contending that the warrant was defective and the officers lacked probable cause to search the property. The motion to suppress evidence was denied. Pet. App. 7a. A jury ultimately convicted Mr. Berger of using a registered pesticide (Furadan) in a manner inconsistent with its labeling in violation of 7 U.S.C. § 136j(a)(2)(G). Pet. App. 7a. He was acquitted on various other counts. Subsequent to Mr. Berger's

conviction, but prior to his sentencing by the magistrate judge, CNN broadcasted some of the video footage in a news story about ranchers killing predators, which featured the investigation and prosecution of Mr. Berger. *Id.* at 28a.

C. The District Court Proceedings.

The Bergers sued petitioners and the media under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), alleging that their constitutional rights were violated. They also alleged trespass against the media crew and the assistant prosecutor who had accompanied the officers as they executed the warrant. In addition, they raised various other federal and state law claims against the media, including conversion, intentional infliction of emotional distress, and violation of the federal wiretap statute.

The principal contentions underlying the *Bivens* claim were that the federal officers violated the Fourth Amendment by permitting the media crew to film their execution of the search warrant, and that the media had acted sufficiently in concert with the officers to be treated as government actors for purposes of this lawsuit. Pet. App. 2a. Petitioners moved to dismiss the *Bivens* claim, or in the alternative for summary judgment, raising the defense of qualified immunity.

The District Court treated the motion as one for summary judgment, and upheld the defense of qualified immunity. The court began by recognizing, correctly, that the plaintiffs bore "the threshold burden of demonstrating that the constitutional rights at issue were clearly established at the time of the officer's allegedly unlawful act," which requires a survey of the legal landscape "as it existed at the time of the conduct in question." Pet. App. 31a. The court stated that it would begin with binding Supreme Court or Ninth Circuit precedent, and in its absence would proceed to consider all available decisional law that preceded the actions in question. *Id.*

The court concluded that there was *no* authority -- binding or otherwise -- holding that petitioners' conduct violated the Fourth Amendment at the time they acted. Indeed, such law as

existed at the time suggested instead that the officers' conduct was consistent with the Fourth Amendment. Based on this conclusion, and on the controlling law as articulated by the Supreme Court, the court held that the defense of qualified immunity was proper:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.
>
> No case at the time of the search directly stated the proposition that allowing media observers to attend the execution of an otherwise valid search violated the constitutional rights of one whose property was the subject of the search. To the contrary, the case law at the time suggested that the presence of media observers did not violate constitutional rights.

Pet. App. 34a (citing *Moncrief v. Hanton*, 10 Med. L. Rep. (BNA) 1620 (N.D. Ohio Jan. 6, 1984), *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980), and *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980)).[3]

---

[3] The court also held that the Bergers were collaterally estopped from relitigating the reasonableness of the search because those same issues had been decided adversely to Mr. Berger in his criminal trial, Pet. App. 39a-40a; that the media had not become government actors for purposes of *Bivens* liability, *id.*; and that the Bergers had not sufficiently established their federal wiretap claim or their common law claims, *id.* at 41a-46a.

D. The Decision by the Court of Appeals.

The Ninth Circuit reversed. On qualified immunity, in particular, the court held that "even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a (citing *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995)). The court turned on its head this Court's standard approach to determining whether the law was clearly established at the time, stating:

> We find even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of a warranted search where broadcast media were present to document the incident for non-law enforcement purposes, and where the videotaping and sound recording were outside the scope of the warrant.

Pet. App. 11a-12a.

The court declined to follow the contrary holdings on qualified immunity in *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), and *Wilson v. Layne*, 110 F.3d 1071 (4th Cir. 1997), *aff'd*, 141 F.3d 111 (1998) (en banc), *cert. granted* No. 98-83, without addressing those courts' analysis. Pet. App. 12a. The court also brushed off the prior decisions to the contrary that the District Court had relied on to uphold the defense of qualified immunity, opining that in those cases "the media representatives were viewed as playing a passive role, as observers, rather than as active participants in planned activity that transformed the execution of a search warrant into television entertainment, as happened here." *Id.* at 13a (citing *Moncrief*, *Higbee*, and *Prahl*).[4]

---

[4] The Ninth Circuit also rejected the claim of collateral estoppel and held that the media acted jointly with the federal officers and thus "under color of law." Pet. App. 3a. It reinstated the Bergers' common law claims for trespass and intentional infliction of emotional distress, but rejected their claims for conversion and for violation of the federal wiretap statute. *Id.*

SUMMARY OF ARGUMENT

The Court has directed the parties to brief both the Fourth Amendment issue and the qualified immunity issue.

First, petitioners did not violate the Fourth Amendment by allowing members of the news media to accompany them and to observe and record their execution of a warrant. In this case, it is undisputed that the search warrant was valid and that it was issued by a court upon a showing of probable cause. In addition, there is no dispute here that the officers properly executed the warrant to search the Bergers' ranch and its appurtenant structures for specific evidence of the alleged illegal taking of wildlife. The members of the news media who accompanied the officers did not actively participate in executing the warrant; they merely observed and recorded the officers' conduct and did not themselves engage in any independent search or seizure.

The Fourth Amendment permits officers who are executing a warrant to allow third parties to accompany them to aid in discharging their law enforcement mission. The conduct of the officers in this case fits comfortably within these established constitutional principles. The common practice of allowing members of the public and the news media to accompany officers and to observe and record their conduct is reasonable and helps to facilitate effective law enforcement. Publicizing the government's efforts to combat crime enhances public confidence and helps to deter crime, as the media policy contained in the United States Attorneys' Manual at the time explicitly stated. Improving public oversight of police activities through accurate media coverage is also a legitimate function of law enforcement that can reasonably be judged to deter improper conduct by law enforcement officers. In addition, in every case the law enforcement mission is aided by an accurate recording of events, by such means as audiotape or videotape.

In this case, in particular, it was reasonable for the officers to allow members of the news media to accompany them in order to observe and record their execution of the search warrant. The media personnel were limited to a purely passive

role, and petitioners were present at all times to monitor their actions. In the wake of the officers' entry and execution of a warrant to search the ranch, based on probable cause, for evidence of crime that appeared unlikely to implicate intimate personal details, any additional infringement of privacy by the presence of a few media personnel was only marginal. And it was reasonable for petitioners to judge that the recording of video and audio footage would aid the law enforcement mission by helping to deter crime, enhancing public confidence, and creating an accurate record of events. Moreover, any improper intrusion or disclosure by officers or others can be redressed under the common law without creating a new basis for suppressing evidence in criminal prosecutions.

Second, even if the Court were to hold in this case -- as a matter of first impression -- that the officers violated the Fourth Amendment by allowing members of the news media to accompany them as they executed the warrant, petitioners are entitled to a defense of qualified immunity. At the time they acted, it was not apparent in the light of preexisting law that their conduct violated the Constitution. Indeed, the practice of news media accompanying officers to observe and report on their actions was relatively widespread, and such legal authority as existed at the time had uniformly upheld its validity. Even in the last few years, the most recent lower court opinions reveal deep divisions among judges over the question of whether these actions violate the Fourth Amendment at all. In these circumstances, to require law enforcement officers, or any public officials, to gauge future developments in constitutional jurisprudence on pain of personal liability for money damages cannot be reconciled with the settled purposes of the qualified immunity doctrine.

ARGUMENT

Petitioners will begin by addressing the Fourth Amendment question posed by the Court, which is one of first impression. Petitioners then will proceed to discuss the controlling law that supports their defense of qualified immunity in this case.

I. PETITIONERS DID NOT VIOLATE THE FOURTH AMENDMENT BY ALLOWING MEMBERS OF THE NEWS MEDIA TO ACCOMPANY THEM AND TO OBSERVE AND RECORD THEIR EXECUTION OF A WARRANT.

Petitioners did not violate the Fourth Amendment in this case. Their actions in obtaining and executing the warrant were entirely proper. Mr. Berger challenged the legality of the officers' conduct in his criminal trial by means of a motion to suppress evidence; that motion was correctly denied. The ancillary claim raised here -- that allowing members of the news media to accompany officers merely to observe and record their execution of a warrant *ipso facto* violates the Fourth Amendment and renders inadmissible any evidence generated by their search -- should be rejected also.

A. The Warrant Was Valid and Was Issued by a Court upon a Showing of Probable Cause.

The District Court noted in this case that the federal officers were acting pursuant to a valid search warrant. Pet. App. 30a ("The question to be answered in this case is whether on March 24, 1993 it was clearly established that the Bergers' Fourth Amendment freedom from unreasonable searches and seizures was violated when government agents *executing a valid search warrant* allowed representatives of the news media to observe and document the search.") (emphasis added).

Petitioners applied for a search warrant on March 18, 1993; the application was approved and the warrant was issued on the same day. J.A. 17-18. Probable cause to issue the warrant was established through the accompanying affidavit submitted by petitioner Hanlon, a special agent of the U.S. Fish and Wildlife Service. *Id.* at 19-26. Hanlon's sworn statement noted that federal agents had been investigating the poisoning of eagles and other migratory birds on the Bergers' ranch since January 1993. It discussed information that had been received from state wildlife officials indicating that Mr. Berger had used poisons to kill eagles on his ranch, and described interviews that had been conducted with three former employees of Mr.

Berger, which supported those allegations. *Id.* at 21-24. Hanlon also performed a records check to locate the Bergers' land before applying for the search warrant. *Id.* at 24, 26.

Petitioners' application sought permission to search the Bergers' ranch and its appurtenant structures, excluding the residence, for evidence that would document the taking of wildlife in violation of federal law. *Id.* at 19. U.S. Magistrate Judge Robert Holter approved the application and issued the search warrant, which commanded "any authorized officer of the United States" to search those premises for items described with the requisite particularity as "documents, records, coyote getters, cyanide charges, chemicals, livestock carcasses and wildlife carcasses, including eagles, which would document the taking of wildlife in violation of Federal laws." *Id.* at 17-18. Judge Holter directed that the search could be made at any time between 6:00 a.m. and 10:00 p.m. on or before March 26, 1993. Upon execution of the search warrant, the officers were ordered to leave a copy of the warrant and a receipt for any person or property taken from the premises, to prepare a written inventory of any person or property seized, and to return the warrant promptly to the judge. *Id.*; *see* Fed. R. Crim. P. 41.

Before his criminal trial, Mr. Berger challenged the validity of the search warrant in a motion to suppress evidence. *See* Pet. App. 8a-9a. He contended that the supporting affidavits failed to establish probable cause for the issuance of the warrant, challenging both the veracity of the informants and the extent to which their statements had been independently corroborated. Mr. Berger also challenged the search warrant on the basis of staleness, and claimed that the property designated in the warrant was improperly described. *Id.* Magistrate Judge Richard W. Anderson denied the motion to suppress, upholding the validity of the search warrant on all grounds. *Id.*; *see also*

E.R. Tab 5, Exh. G, at 3-5.[5] Thus it is clear that the officers properly obtained a valid search warrant in this case.

B. The Officers Properly Executed the Warrant to Search the Ranch for Evidence of Crimes.

On the morning of March 24, 1993, the federal officers, the assistant federal prosecutor, and the media crew proceeded to a point near the Bergers' ranch. Pet. App. 6a. The timing of the search was within the parameters set forth in the warrant. The events were being recorded on videotape and audiotape, which is permissible under state and federal law -- indeed, both courts below expressly rejected respondents' claims that these actions gave rise to a tort of conversion under Montana law, *see id.* at 43a-44a; *id.* at 24a-25a, and that they violated the Federal Wiretap Act, *see id.* at 41a-42a; *id.* at 21a-22a.

Mr. Berger met the officers on the road outside the ranch. Petitioner Scrafford informed him of the search warrant and served it upon him, in compliance with the requirements of federal law. *See* 18 U.S.C. § 3105 (specifying who may serve a search warrant). He also asked permission to ride with Mr. Berger onto the ranch, and to enter the Bergers' house in order to explain to Mrs. Berger what they were going to do. Mr. Berger consented to this entry, and they entered the house and conversed with Mrs. Berger. Pet. App. 6a.[6] The rest of the group followed them onto the property, and the federal officers spent most of the day executing the warrant by searching the ranch and outbuildings for the items described with particularity in the warrant. The officers followed the procedures specified in the warrant, which included making an inventory of the

---

[5] The media defendants have asserted this ruling as the basis for a claim of collateral estoppel on the Fourth Amendment issue, a claim that was accepted by the District Court, *see* Pet. App. 39a-40a, but rejected by the Court of Appeals, *see id.* at 7a-9a. At this juncture, the issue has no bearing on the Court's consideration of the Fourth Amendment issue.

[6] Although respondents had disputed whether Mr. Berger consented to this entry, the Court of Appeals was able to resolve this issue by noting that his consent was indicated by audio recorded at the site. Pet. App. 6a.

property seized. The officers' conduct in executing the warrant was recorded on more than eight hours of sound recordings and video footage, which reveal no improprieties in complying with the substance and scope of the search warrant. *See id.*; *id.* at 34a ("otherwise valid search"). The District Court also found that the "execution of the warrant was not disrupted by the presence of the media." *Id.* at 45a.

In the motion to suppress evidence, Mr. Berger challenged the execution of the warrant, claiming that the officers seized evidence improperly because the warrant did not describe the premises accurately. Although the magistrate judge found that the officers had "grossly" overstated the amount of real estate owned by Mr. Berger, he observed that "not every technical defect offends the constitution," and ruled that the evidence had been properly seized because it was found on the deeded lands. E.R. Tab 5, Exh. G, at 4. He therefore denied the motion. *Id.* at 5. Evidence gathered during the search of the ranch was later admitted for use during Mr. Berger's criminal trial.

C. The Members of the News Media Did Not Actively Participate in Executing the Warrant and Did Not Conduct Any Search or Seizure.

The District Court stated that this case does not involve a situation in which the media actively participated in searching for or seizing evidence; rather, the media defendants were "simply observing the agents who were serving the warrant." Pet. App. 36a. The same was true of the assistant federal prosecutor, who was not himself authorized to serve or execute the warrant, and who took no active role in the search. And though the court below referred to the officers' active "planning, cooperation and assistance to the media that occurred in this case," *id.* at 12a, it never suggested that the media actively participated in the officers' search of the ranch.

Indeed, the District Court relied on this distinction to dismiss several cases cited by respondents, which involved third parties who accompanied officers and "who actively participated with the officers in a search for evidence" that was unauthorized because the items that the third parties searched

for were not mentioned or specified in the warrant. Pet. App. 33a (distinguishing *United States v. Wright*, 667 F.2d 793 (9th Cir. 1982), and *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980) (per curiam)). *See also* Pet. App. 34a (distinguishing *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995), because "the case involved law enforcement officers inviting a private person to engage in an independent general search of the home for items never mentioned in the warrant"). In such cases, the Fourth Amendment is violated because the third parties are enlisted to engage in conduct that is forbidden to the officers because it exceeds the scope of the warrant. In this case, however, the members of the news media were neither encouraged nor permitted to engage in any such conduct.

Moreover, under the Court's settled precedents, the officers and the media did not engage in an independent search when they made a video and audio recording of the officers' actions in executing the search warrant. The officers did not violate the Fourth Amendment by carrying a radio transmitter onto the ranch to record their conversations, even though its existence was concealed from the Bergers. *See, e.g., United States v. White*, 401 U.S. 745, 753 (1971) (no search because no invasion of any reasonable expectation of privacy, as "we are not prepared to hold that a defendant who has no constitutional right to exclude the [officer's] unaided testimony nevertheless has a Fourth Amendment privilege against a more accurate version of the events in question"); *Lopez v. United States*, 373 U.S. 427, 439 (1963) (same result because "the device was used only to obtain the most reliable evidence possible of a conversation in which the Government's own agent was a participant and which that agent was fully entitled to disclose"); *On Lee v. United States*, 343 U.S. 747, 752 (1952) (dismissing as "verging on the frivolous" the claim that wiring an agent for sound to be transmitted to a nearby receiving set was in violation of the Fourth Amendment); *see also United States v. Caceres*, 440 U.S. 741, 750-52 (1979) (reaffirming these decisions and holding that an individual's claim to privacy is not protected in this situation, which "does not raise any constitutional questions").

Similarly, the officers and the media did not violate the Fourth Amendment by videotaping the events. The same logic that the Court has applied to audiotaping, in the series of cases cited in the previous paragraph, applies with equal force to videotaping. There is no search here either, for as the Court concluded in *White*, there is no invasion of any reasonable expectation of privacy; on the contrary, "a defendant who has no constitutional right to exclude the [officer's] unaided testimony" about what he saw has no "Fourth Amendment privilege against a more accurate version of the events in question." 401 U.S. at 753. Matters that were in plain view could be observed and thus recorded by the officers or by third parties acting at their behest without constituting an independent search within the meaning of the Fourth Amendment. *See, e.g., Arizona v. Hicks*, 480 U.S. 321, 325 (1987); *Texas v. Brown*, 460 U.S. 730, 739 (1983) (plurality opinion); *see also Weeks v. United States*, 232 U.S. 383, 397 (1914) ("a search ordinarily implies a quest").

Indeed, this case can be viewed as presenting the obverse of the rule adopted in *United States v. Jacobsen*, 466 U.S. 109 (1984), where the Court held that "additional invasions of respondent's privacy by the government agency must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115. In that case, law enforcement officers acting without a warrant repeated a search that had already been performed by private employees, and by that means observed matters that had already been revealed in the course of that prior private search. The Court determined that their actions did not amount to an independent intrusion and thus "infringed no legitimate expectation of privacy . . . within the meaning of the Fourth Amendment." *Id.* at 120. By the same token, in this case the media did not actively participate in executing the warrant, and did not independently engage in any search; instead, they merely observed and recorded what occurred as the officers properly executed the search warrant. According to *Jacobsen*, therefore, their purely passive conduct did not amount to an independent intrusion and similarly did not

constitute any new or separate violation of the Fourth Amendment. *Id.*

In addition, the recording of video and audio footage did not constitute a seizure in violation of the Fourth Amendment. In rejecting respondents' claim for conversion, the District Court noted that the media did not seize any tangible items, including any of the persons or property described with particularity in the search warrant. Pet. App. 43a. Instead, they merely observed and recorded what the officers themselves saw and heard as they executed the warrant. The resulting video and audio footage documented nothing but "recorded sounds and images," all of which were already open to observation by the officers. *Id.* Under *Jacobsen*, again, no seizure occurs within the meaning of the Fourth Amendment because there is no "meaningful interference with a person's possessory interests in that property." 466 U.S. at 113; *see Hicks*, 480 U.S. 321, 324 (1987) (recording serial numbers observed on stereo equipment did not meaningfully interfere with anyone's possessory interest and hence is not a seizure); *United States v. Karo*, 468 U.S. 705, 712 (1984) (placing electronic tracking device in container does not interfere with anyone's possessory interest in a meaningful way and hence is not a seizure); *see also White*, 401 U.S. at 753 (device merely used to obtain "a more accurate version of the events in question"); *Lopez*, 373 U.S. at 439 (device merely used "to obtain the most reliable evidence" of events in which government agent participated).

Thus, no independent search or seizure occurred in this case apart from the officers' own actions in properly executing the search warrant.[7]

---

[7] For these reasons, the federal statute which identifies who may serve search warrants, 18 U.S.C. § 3105, is inapplicable in the circumstances of this case, where only the officers served and executed the search warrant.

D. The Fourth Amendment Permits Officers Who Are Executing a Warrant to Allow Third Parties to Accompany Them to Aid in Discharging Their Law Enforcement Mission.

The foregoing discussion establishes that the officers did not violate the Fourth Amendment by their own actions in searching for and seizing evidence in this case, and they did not permit the media to engage in any independent search or seizure. The only remaining issue here, therefore, is whether the Fourth Amendment is violated by the mere presence of third parties, such as members of the news media, when officers are properly executing a valid warrant.

The proper legal framework for determining this issue is the "general touchstone of reasonableness which governs Fourth Amendment analysis," including "the manner of executing a search warrant." *United States v. Ramirez*, 118 S. Ct. 992, 996 (1998) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (per curiam)); *see also Michigan v. Summers*, 452 U.S. 692, 699-700 (1981) (Court applies "the ultimate standard of reasonableness embodied in the Fourth Amendment" to judge the propriety of any additional intrusions that are effected in executing a search warrant). Applying the reasonableness standard in this context, the Court has noted that "the specificity required by the Fourth Amendment does not generally extend to the means by which warrants are executed." *Dalia v. United States*, 441 U.S. 238, 257 (1979).

Instead, the Court has held that the Fourth Amendment and precedent impose "only three" specific requirements on the content of search warrants: (1) that they be issued by neutral and detached magistrates; (2) that they be based on probable cause; and (3) that they describe with particularity the place to be searched and the things to be seized. *Id.* at 255. Above and beyond these requirements, the manner of executing a warrant is left in the first instance to the officers' discretion, subject only to judicial review of the reasonableness of their conduct after the fact:

> Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the three requirements discussed above, search warrants also must include a specification of the precise manner in which they are to be executed. On the contrary, it is generally left to the discretion of the executing officers to determine the details of how best to proceed with the performance of a search authorized by warrant -- subject, of course, to the general Fourth Amendment protection "against unreasonable searches and seizures."

Id. at 257.

The discretion that officers are afforded when they execute a warrant includes the authority to determine when third parties may accompany them. The warrant in this case, in line with consistent practice in other jurisdictions, was directed only to any "Authorized Officer of the United States." J.A. 17-18 (search warrant). It has long been understood, however, that officers who are authorized to serve and execute a warrant have reasonable discretion to allow third parties to accompany them in order to further their law enforcement mission. For example, in legions of cases officers have recruited individuals to go along as they execute a search warrant inside a home in order to help them determine what evidence should be identified and seized; the courts have routinely upheld this practice as consistent with the Fourth Amendment, even though the presence of such individuals was not authorized by the warrant. *See, e.g., State v. Klosterman*, 317 N.W.2d 796, 803 (N.D. 1982) (victims of theft accompanied officers in search of defendant's home for stolen property); *People v. Superior Ct.*, 598 P.2d 877, 881 (Cal. 1979) (same); *Commonwealth v. Farrar*, 413 A.2d 1094, 1096-99 (Pa. Super. 1979) (private citizens accompanied officers executing search warrant in defendant's home for stolen property). These permissible third parties may even be ancillary personnel with no personal knowledge of the crime being investigated. *State v. Wade*, 544 So. 2d 1028, 1030-31 (Fla. App. 1989) (police allowed

computer company employees to accompany them in executing search warrant inside a home to identify stolen computer equipment); *United States v. Clouston*, 623 F.2d 485, 486-87 (6th Cir. 1980) (per curiam) (police allowed telephone company employees to accompany them in executing search warrant inside a home and to identify telephone company property not listed in the warrant); *People v. Turner*, 57 Cal. Rptr. 854, 865 (Ct. App. 1967) (police allowed employer's fraud investigators to accompany them into employee's home to execute search warrant).

By the same token, law enforcement officers may have other good reasons to allow third parties to accompany and observe their conduct in executing a warrant, even though the third parties are not directly assisting them in conducting a search for evidence. It would be appropriate, for instance, for officers to bring colleagues along with them for purposes of supervision or evaluation. *Cf. Crowder v. Sinyard*, 884 F.2d 804, 819 (5th Cir. 1989) ("the presence and participation of additional officers," even unauthorized officers from other jurisdictions who were present "to provide expert guidance" does not "render unlawful an intrusion by other officers who are properly on the scene"). It would also be appropriate, as in this case, for officers to allow an attorney to accompany them who did not assist in executing the warrant but who was likely to be involved in prosecuting any ensuing criminal charges. *See* Pet. App. 6a; *see also Kelley v. State*, 315 S.E.2d 916, 919 (Ga. App. 1984) (no Fourth Amendment violation where "Assistant United States Attorney was a mere observer of the search and did not participate in it"). And it would be appropriate for officers who properly desired to videotape or photograph the scene of a search or an arrest to allow third parties to accompany them for that purpose, so that they could concentrate their own efforts and attention on executing the

warrant. *See, e.g., Stack v. Killian*, 96 F.3d 159, 163 (6th Cir. 1996).[8]

The rationale for this limited discretion recognizes that the marginal infringement on privacy by having one or a few persons accompany officers who are already lawfully making an entry pursuant to a warrant is simply not of the same magnitude as the infringement effectuated by the initial entry itself. *See, e.g., Summers*, 452 U.S. at 701-03 (even the forcible detention of an individual "represents only an incremental intrusion on personal liberty when the search of a home has been authorized by a valid warrant," which already constitutes "a substantial invasion of the privacy of the persons who resided there"). Again, as in *Jacobsen*, the impact of any "additional invasions of . . . privacy" must be assessed "by the degree to which they exceeded the scope of the [initial] search." 466 U.S. at 115. And this same line of reasoning has led the Court to hold that electronic recording of conversations between an individual and a government agent does not violate the Fourth Amendment, *see White*, 401 U.S. at 753, whereas electronic eavesdropping on private conversations may do so, *see Katz v. United States*, 389 U.S. 347 (1967).

At all times, however, the officers executing the warrant are "responsible for appropriately limiting a civilian's role in the conduct of a warranted search." *Commonwealth v. Sbordone*, 678 N.E.2d 1184, 1189 (Mass. 1997). If the third parties present on the scene take an active part in executing the warrant or are permitted to engage in their own independent search or seizure of items not covered by the warrant, then the

---

[8] In *Stack*, the officers' application for a search warrant actually mentioned that they planned to photograph and videotape their execution of the warrant. In our view, it was unnecessary to seek such permission, since these actions do not constitute an independent search or seizure. *See supra* Part IC. But the important holding in the case was that the officers did not need specific authorization to allow a media crew to accompany them in order to carry out this task: "even though the warrant said nothing about a television crew," the officers were justified "in permitting the accompaniment of camera personnel." 96 F.3d at 163.

Fourth Amendment is violated, regardless of whether the officers encouraged or sanctioned their conduct. *See, e.g.*, *Buonocore v. Harris*, 65 F.3d 347 (4th Cir. 1995) (Fourth Amendment violated when private security officer accompanied police and performed independent search for items not specified in the warrant); *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988) (same).

E. The Common Practice of Allowing News Media to Accompany Officers and to Observe and Record Their Conduct Is Reasonable and Helps to Facilitate Effective Law Enforcement.

In many cases over many years, officers have permitted third-party members of the news media to accompany them and to observe and record their entry on private premises, for purposes such as to facilitate accurate news coverage or to deter criminals by publicizing their crimefighting efforts. *See, e.g.*, *Rogers v. Buckel*, 615 N.E.2d 669 (Ohio Ct. App. 1992) (media accompanied officers into home); *Magenis v. Fisher Broadcasting, Inc.*, 798 P.2d 1106 (Or. Ct. App. 1990) (same); *Scott v. State*, 559 So. 2d 269, 272 (Fla. Ct. App. 1990) (same); *Miller v. NBC*, 187 Cal. App. 3d 1463, 232 Cal. Rptr. 668 (1986) (same); *Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984) (same); *Anderson v. WROC-TV*, 441 N.Y.2d 220 (Ct. App. 1981) (same); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980) (same); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980) (same). In none of these cases was such conduct found to have violated the Fourth Amendment. *But see Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995).

On the contrary, officers have been generally understood to exercise reasonable discretion about when it would further their law enforcement mission to permit members of the news media to accompany them in executing a warrant, as long as the officers appropriately limit the media's involvement and do not permit them to engage in any independent search or seizure of evidence. Indeed, this common practice mirrors a standard policy in virtually every jurisdiction, which authorizes law

enforcement to permit members of the general public to "ride along" with officers and to observe them performing their official duties. The practice of "media ride alongs" is so pervasive, in fact, that some courts long ago found that the practice already had qualified as a "common custom and usage" under the common law. *See, e.g., Florida Publishing Co. v. Fletcher*, 340 So. 2d 914, 915-17 (Fla. 1976) (allowing media to accompany officers when they enter private property "is a widespread practice of long-standing"), *cert. denied*, 431 U.S. 930 (1977); *see also infra* Part IID (discussing cases).

In these situations, officers can reasonably determine that once they are already making a valid entry onto the premises pursuant to a warrant, the marginal effects of allowing members of the news media to accompany them may be outweighed by the many sound justifications for allowing media to observe and record their conduct in executing the warrant. For example, a major objective that is served by this practice is to publicize the government's efforts to combat crime. Handled with appropriate care, this is a legitimate law enforcement objective, for publicizing the fight against crime is itself a valuable weapon in helping to deter crime. *See, e.g., Aversa v. United States*, 99 F.3d 1200, 1213 (1st Cir. 1996) (referring to need for IRS to "inform the public" so as to "deter violations of the law"). Indeed, the media policy contained in the United States Attorneys' Manual at the time recognized this fact by authorizing Department personnel to "assist the news media in photographing, taping, recording, or televising a law enforcement activity," in order to "promote the aims of law enforcement, including the deterrence of criminal conduct." *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII(B) (Assisting the News Media) (as amended Jan.14, 1993) (reprinted in the Appendix to this brief) (hereafter "App."). *See also infra* note 13.

Other reasonable objectives may also be served by this practice. The oversight function of the press has been widely remarked, and the presence of third parties could serve in some situations to minimize police abuses and protect suspects. *See, e.g., Wilson v. Layne*, 141 F.3d 111, 118 (4th Cir. 1998) (en

banc), *cert. granted* No. 98-83; *cf. People v. Boyd*, 474 N.Y.S.2d 661, 665 (Sup. Ct. 1984) ("the presence of the corroboration witness provides a fair method for augmented assurance that the warrant will not be executed with excess"). In other situations, officers could reasonably determine that the presence of media or other third parties would help to protect the safety of the officers. *See Wilson*, 141 F.3d at 118. Moreover, in many situations, officers are assisted by having an audio and video recording of their actions, which presents "a more accurate version of the events in question." *White*, 401 U.S. at 753; *see Ohio v. Robinette*, 117 S. Ct. 417, 419 (1996) (describing use of "mounted video camera" to record details of routine traffic stop). Disputes over what was said or done, which may become issues in related criminal proceedings or create the potential for later civil liability, can be put to rest by referring to a tape that constitutes "the most reliable evidence possible" of activities in which the officers participated and which they were "fully entitled to disclose." *Lopez*, 373 U.S. at 439. *See, e.g., United States v. Hubbard*, 493 F. Supp. 209, 230-31 (D.D.C. 1979) (taking of photographs that "accurately record the events of the search" is "a good police practice").

It is also "a legitimate function of law enforcement to facilitate accurate reporting on law-enforcement activities." *See Wilson*, 141 F.3d at 118. Indeed, the media ride-along policy issued by the U.S. Marshals Service in *Wilson* "indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride alongs advanced that interest." *Id.* In the same vein, the media policy contained in the United States Attorneys' Manual at the time of the events in this case noted that such activities could serve to "promote the aims of law enforcement, including . . . the enhancement of public confidence." U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000, section VIIB (App.). This Court has likewise noted in other contexts that public access to otherwise private facts may be justified in some instances to "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *United States Dept. of Defense v. FLRA*,

510 U.S. 487, 497 (1994) (FOIA). How law enforcement officers are waging the fight against crime is a proper matter of public interest, as even the common law has recognized in fashioning its legal protections for individual privacy.[9] *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion) ("especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results"); *id.* at 604 (Blackmun, J., concurring) ("public has an intense interest and deserved right to know" about "the administration of justice," "the prosecution of local crimes," and "the conduct of . . . police officers").

Indeed, a ruling that law enforcement officers can *never* allow members of the news media to accompany them in order to observe and report on their execution of a warrant would mean that all such activity, which is rife with the potential for abuse, would henceforth occur in secret. This approach would sharply clash with the Court's frequent endorsement of Justice Brandeis' observation that "publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (quotation omitted). The resulting closed regime of law enforcement operations would disserve, rather than further, the fundamental interests that the Fourth Amendment is designed to protect. And such a draconian and categorical rule

---

[9] *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D, comment g ("Included within the scope of legitimate public concern are matters of the kind customarily regarded as 'news,'" including "homicide and other crimes, arrests, police raids"); *id.*, comment f ("Those who commit crime or are accused of it may not only not seek publicity but may make every possible effort to avoid it, but they are nevertheless persons of public interest, concerning whom the public is entitled to be informed," as they constitute "involuntary public figures"). *See also Taylor v. KTVB, Inc.*, 525 P.2d 984, 986 (Idaho 1974) ("The authorities writing in the area of invasion of privacy have all assumed and concluded that reports of governmental action in criminal matters are the legitimate province of a free press.").

would be unfaithful to the pragmatic "reasonableness" standard that is the touchstone of Fourth Amendment analysis.

Of course, none of the reasons discussed above would *mandate* that police must allow the presence of third parties, civilian employees, prosecutors, or members of the news media at the scene of a police raid. In many instances, indeed, officers may well judge that it is neither prudent nor desirable to do so. And certainly the press can claim no *right* to be present at the scene. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) ("Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded."); *Associated Press v. NLRB*, 301 U.S. 103, 133 (1937) (newspaper publisher "has no special privilege to invade the rights and liberties of others"). But the issue here is different and the claim is more modest: officers in particular cases are permitted to exercise reasonable discretion about whether allowing members of the news media to accompany them merely in order to observe and record the execution of a warrant will further their law enforcement mission.

F. In This Case, It Was Reasonable for Petitioners to Allow Members of the News Media to Accompany Them and Observe and Record Them Executing the Search Warrant.

It remains, then, to apply the foregoing analysis to the facts of this case. In performing the requisite Fourth Amendment inquiry into the reasonableness of petitioners' conduct, "it is necessary to examine both the character of the official intrusion and its justification." *Summers*, 452 U.S. at 701.

Here, petitioners had already procured a valid search warrant for the Berger ranch, which authorized a "substantial invasion of privacy" that resulted in an all-day search of the premises for evidence of crime. *Id.* The media presence was limited to three people, who accompanied approximately twenty officers who were engaged in executing the warrant. Care was taken to limit the media to a purely passive role that did not include engaging in any independent search or seizure of evidence. The officers were present at all times and able to

monitor the media's actions, which also were circumscribed by the terms of a written agreement that was designed to prevent any potential publicity from interfering with an ensuing criminal prosecution. *See* J.A. 90-91. The alleged crimes which gave rise to the search did not appear to involve any intensely private matters or intimate personal details.

On the other side of the scale, petitioners could make a reasonable judgment that allowing members of the news media to accompany them in order to observe and record their actions would be beneficial to their law enforcement mission.[10] The media personnel were present to gather news through video and audio footage that petitioners determined would be useful to their law enforcement mission by helping to publicize their efforts to combat environmental crime. Pet. App. 4a. This determination was reasonable and indeed was in accord with the Justice Department's media policy in place at the time. *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000, section VIIB (App.). At the same time, the media's involvement was likely to "promote the aims of law enforcement" by "enhanc[ing] public confidence" in their activities and objectives. *See id.*

The media also made an audio and video recording of the officers' actions in executing the warrant that was likely to prove useful as "the most reliable evidence possible" of the events. *Lopez*, 373 U.S. at 439. Indeed, in this case, that is precisely what happened. One of respondents' allegations was that Mr. Berger never gave consent for petitioner Scrafford to enter the residence. *See* J.A. 119 (¶ 45). If correct, this fact would establish a violation of the Fourth Amendment, for the Bergers' residence was explicitly excluded from the scope of

---

[10] As in any case applying the Fourth Amendment, the actual subjective motivations of individual officers are irrelevant to the analysis of whether their conduct was objectively "reasonable." *Scott v. United States*, 436 U.S. 128, 137 (1978). And by the same token, relating to the legal analysis in Part II, *infra*, the Court has stressed that "[e]vidence concerning the defendant's subjective intent is simply irrelevant to [the qualified immunity] defense." *Crawford-El v. Britton*, 118 S. Ct. 1584, 1592 (1998).

the warrant. Pet. App. 5a. Yet the court below was able to resolve this dispute conclusively because "[a]udio recorded at the site indicates that Mr. Berger consented to Agent Scrafford's entry into the home at this time." *Id.* at 6a; *cf. Robinette*, 117 S. Ct. at 421 (use of videotape would aid in resolving fact-specific inquiry into whether "a consent to search may be deemed voluntary"). Similarly, one of the issues that surfaced in Mr. Berger's motion to suppress evidence in his criminal case was the location of the evidence that was seized from the ranch, whose parameters were not described correctly in the warrant. *See* E.R. Tab 5, Exh. G, at 4. The videotape of the search and seizures that occurred at the ranch could again be of assistance in resolving this kind of disputed issue. *See, e.g., United States v. Nicholson*, 17 F.3d 1294, 1296 (10th Cir. 1994) (videotape of search reviewed to resolve suppression issue).

Indeed, similar reasoning was thought to justify the presence of petitioner McLean at the ranch. McLean is a lawyer, not a law enforcement officer authorized to serve warrants. *See* Fed. R. Crim. P. 41(h) ("federal law enforcement officer" as used in this rule means "any government agent, other than an attorney for the government"). He was not involved in executing the warrant, did not assist the officers in doing so, and did not take part in the search. His presence at the scene was related to furthering the law enforcement mission only in a more tangential way -- he was the assistant prosecutor who probably would be involved in prosecuting any criminal charges that might be brought against Mr. Berger. In the end, this turned out to be the case: McLean did serve as part of the prosecution trial team that obtained Mr. Berger's conviction.

In the circumstances, the officers could make a reasonable judgment that McLean's presence on the premises, observing the execution of the warrant, would be helpful in facilitating the broader goals of effective law enforcement, even though he provided no immediate assistance to the officers in executing the warrant or searching for evidence. *See, e.g., Kelley*, 315 S.E.2d at 919 (no Fourth Amendment violation where Assistant United States Attorney "was a mere observer and did not

participate in the search").[11] But the categorical ruling sought by respondents would not permit such reasonable judgments to be made, and would open up broad new vistas for finding constitutional violations based on whether third parties like McLean, members of the news media, or others were ever permitted to be present and to witness the execution of a warrant. This approach would be completely out of step with the "general touchstone of reasonableness which governs Fourth Amendment analysis." *Ramirez*, 118 S. Ct. at 996.

In the circumstances of this case, therefore, the manner in which petitioners executed the search warrant was reasonable and did not violate the Fourth Amendment.

G. Any Improper Intrusion or Disclosure by Officers or Others Can Be Redressed Under the Common Law Without Creating a Further Basis for Suppressing Evidence.

If the Court were to hold in this case that the officers violated the Fourth Amendment simply by allowing third parties to accompany them as they executed the warrant, this holding would provide an additional basis for suppressing the evidence that was generated by their investigative efforts. In the criminal proceedings against Mr. Berger, therefore, the defense motion to suppress should have been granted and the prosecution correspondingly impeded, even though it is acknowledged that the warrant was valid and the search was properly executed by the officers themselves. *See, e.g.*, Pet. App. 34a ("otherwise valid search"). Such a holding also would hamstring the legitimate discretion of officers in deciding how best to execute a warrant and further their law enforcement mission in particular instances. If any third parties came to be present at the scene, and the officers made a

---

[11] *See, e.g., Wilson*, 141 F.3d at 118 (emphasizing that it is crucial to the Fourth Amendment analysis "to understand the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose").

reasoned judgment not to eject them or made reasonable but inadequate efforts to do so, this categorical rule would again provide a basis for suppressing any evidence they uncovered.

None of this is necessary in order to ensure that citizens are able to seek redress for any improper intrusion or disclosure committed by officers or by accompanying third parties. As in this case, petitioners and the members of the news media can be sued for trespass, various privacy torts, or intentional infliction of emotional distress. Any such claims brought against federal officials are processed against the United States, but do not subject the individual officers to personal liability for money damages. *See* 28 U.S.C. § 2679(d)(1). These measures are adequate to protect the privacy interests of individual citizens without reaching out to fashion any supplemental basis for relief, grounded in the Constitution, on top of the remedies already available at the common law.

This case (and many cases like it) presents a useful example of the kinds of remedies that can be pursued by individuals who feel aggrieved by such conduct. Respondents sued the members of the news media under the common law for trespass, conversion, and intentional infliction of emotional distress. The District Court dismissed all of their common-law claims, but the Court of Appeals reinstated their claims for trespass and for intentional infliction of emotional distress. It is clear from the case law that third parties who choose to accompany law enforcement officers onto the premises of others do so at their own risk, and may be held liable in tort if a court later determines that they should not have been present. *See, e.g., Miller*, 187 Cal. App. 3d at 1480-81, 232 Cal. Rptr. at 677 (holding media could be liable for trespass when they entered a residence to cover a news story); *Anderson*, 441 N.Y.2d at 227 (same); *Prahl*, 295 N.W.2d at 780 (same).

Indeed, the *Restatement (Second) of Torts* addresses the circumstances in which such conduct may give rise to a common-law claim for intrusion upon seclusion, one of the privacy torts. Section 652B of the *Restatement* states that:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Id. This cause of action affords the basis for a jury trial on claims that the media have intruded upon seclusion when they accompanied police officers into the home. *See, e.g., Rogers*, 615 N.E.2d at 672-73 (remanding for jury trial on whether media committed tort of invasion of privacy by accompanying officers into a home to film a drug raid); *Magenis*, 798 P.2d at 1110-11 (affirming jury verdict for media who were sued for entering home during police narcotics raid and holding that many factual matters bear on the jury's determination of whether an intrusion is "highly offensive"); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249-50 (9th Cir. 1971) (affirming jury verdict for plaintiff against media who were sued for entering home to photograph and audiotape him pursuant to arrangement with district attorney's office, based on state tort law, and declining to address constitutional claim raised under the Fourth Amendment).

Significantly, the common law makes a distinction between the act of intruding upon seclusion, which is defined as one form of privacy tort, and the separate act of later publishing private facts, which is defined as another form of privacy tort. Section 652D of the *Restatement* deals with the latter situation:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

Id. Thus the subsequent act of publicity gives rise to a very different claim even under the common law, and one that has nothing to do with the Fourth Amendment issues raised in this case. Indeed, where officers properly execute a valid warrant, and later act improperly by publicizing private information or

giving it to the media for publication, their conduct is actionable under the common law or perhaps the Due Process Clause, but it does not retroactively create a violation of the Fourth Amendment. *See, e.g., Baker v. Howard*, 419 F.2d 376 (9th Cir. 1969) (improper release of information by police to radio station is not actionable under federal law); *York v. Story*, 324 F.2d 450 (9th Cir. 1963) (police officer taking nude photographs of assault victim and circulating them to other officers is actionable under Due Process Clause as arbitrary conduct that shocks the conscience), *cert. denied*, 376 U.S. 939 (1964); *cf. The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (newspaper published name of rape victim after obtaining it from publicly released police report).

Given the remedies available for redress under state common law, there is no reason to strain to find that the facts of this case violate the Fourth Amendment, which would justify a motion to suppress evidence in any related criminal proceeding and would bar officers from making reasonable judgments about when it is appropriate and will further their law enforcement mission to allow news media to attend and observe the execution of a warrant.

II. IF IN THIS CASE THE COURT HOLDS FOR THE FIRST TIME THAT THIS CONDUCT VIOLATES THE FOURTH AMENDMENT, PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THE LAW WAS NOT CLEARLY ESTABLISHED AT THE TIME THEY ACTED.

The ruling below departs radically from the doctrine of qualified immunity that the Court has extended to state and local officials. The Fourth Amendment issue raised in this case has not been definitively determined by the precedents of this Court or any other court; presents a hotly disputed question on the merits; had been decided in favor of the constitutionality of petitioners' conduct in several decisions rendered before they acted; and at the time of their actions had never been decided adversely to such conduct by *any* court *anywhere*. In these circumstances, the Court's precedents uniformly uphold

petitioners' defense of qualified immunity from the constitutional claim asserted in this lawsuit.

A. Officials Are Shielded from Personal Liability by the Defense of Qualified Immunity Where the Unlawfulness of Their Conduct Is Not Apparent in the Light of Preexisting Law.

The Court has settled that government officials performing discretionary functions are immune from suit unless their conduct violates "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

The purpose of this doctrine is to alleviate concern that the threat of personal liability for money damages would "'dampen the ardor of all but the most resolute or the most irresponsible'" public officials. *Harlow*, 457 U.S. at 814 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.), *cert. denied*, 339 U.S. 949 (1950)). Shielding officials from lawsuits that may distract them from their governmental duties has been judged necessary and appropriate to "encourag[e] the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978); *see also Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Crawford-El v. Britton*, 118 S. Ct. 1584, 1593 n.2 (1998).

To this end, the Court has developed an objective test for determining whether the law existing at the time "clearly established" that such conduct was prohibited. First, the right at issue must be defined with reasonable particularity, which means that "the contours of the right must be sufficiently clear

that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that, in the light of preexisting law, the unlawfulness must be apparent." *Id.* In making this determination, which is a pure question of law, a court should "use its 'full knowledge of its own [and other relevant] precedents,'" *Elder v. Holloway*, 510 U.S. 510, 516 (1994), and thus it is proper to look to "the opinions of this Court, of the Courts of Appeals, or of the local District Court" that existed at the time. *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). *See also Scherer*, 468 U.S. at 192 & n.9.

Above all, the Court has stressed that officials cannot "reasonably have been expected to be aware of a constitutional right that had not yet been declared." *Procunier*, 434 U.S. at 565. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. "If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. For these reasons, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341.

Instead of applying the governing principles laid down by this Court, the court below turned the traditional qualified immunity inquiry upside-down. In rejecting the defense raised by petitioners in this case, the Ninth Circuit purported to find "even further support for this view when we observe that no circuit decision has ever upheld the constitutionality of" such conduct. Pet. App. 11a-12a. That observation, however, is entirely irrelevant to the proper legal analysis. The District Court already had correctly discredited this argument when plaintiffs put it forward on the motion for summary judgment:

> The plaintiffs also argue that no binding decision permitted the defendants' action. But, that is not the standard that we are to follow. The Court is to examine the law at the time of the conduct at issue and determine if that law was so clearly established that a reasonable officer should "know" his conduct was unlawful. For qualified immunity to apply, the law at the time does not have to specifically permit or authorize the defendants' actions, it simply has to fall short of clearly establishing that the conduct was unlawful.

Pet. App. 34a.

In the circumstances presented here, the proper resolution of the Fourth Amendment issue was not apparent in the light of preexisting law. The Court has not squarely addressed the general issue of when third parties may accompany officers in executing a warrant, and is going to decide the specific issue involving news media for the first time in this very case. The Ninth Circuit itself had no clear precedent addressing or foreclosing the issue, but looked to a decision by the Second Circuit that it viewed as persuasive, even though that decision postdated the events at issue here and was itself in conflict with other circuit precedents. *See* Pet. App. 10a-11a (citing *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995)). The only precedent from any court within the Ninth Circuit that existed at the time was the unpublished decision in *Higbee v. Times-Advocate*, 5 Med. L. Rep. (BNA) 2372 (S.D. Cal. Jan. 9, 1980), which had upheld the constitutionality of such conduct. Against that legal landscape, which will be discussed in more detail below, petitioners were entitled to qualified immunity because they "could not reasonably be expected to anticipate subsequent legal developments, nor could [they] fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818.

Nor may a court in this situation saddle public officials with personal liability merely because it may be adamantly

persuaded that its own legal judgments should have been obvious on their face to everyone at all times. Government officials lose the shield of qualified immunity only when the unconstitutionality of their conduct would have been apparent "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818; *Malley*, 475 U.S. at 341. Only in the most egregious circumstances would it be appropriate to apply a kind of "Nuremberg" reasoning to expose public officials to the prospect of paying money damages out of their own pockets for violations that courts discover in hindsight but that were not clearly addressed or foreclosed by prior precedents. As the discussion in Part I, *supra*, makes clear, however, this is not such a case.

B. At the Time Petitioners Acted, Courts Uniformly Held that the Constitution Allows Officers to Permit News Media to Accompany Them to Observe and Record Their Execution of a Warrant, and Justice Department Policy Endorsed the Practice.

At the time petitioners executed the warrant in this case -- March 24, 1993 -- the scanty case law uniformly held that allowing members of the news media to accompany officers in order to observe and record the execution of a warrant did not violate anyone's constitutional rights. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980); *see also Avenson v. Zegart*, 577 F. Supp. 958 (D. Minn. 1984) (holding that such conduct does not infringe any fundamental right triggering more exacting equal protection scrutiny). In addition, this practice was endorsed by the media policy that was contained at the time in the United States Attorneys' Manual issued by the Justice Department. *See* U.S. Dep't of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy), section VII(B) (Assisting the News Media) (as amended Jan.14, 1993) (App.).

In *Moncrief*, for example, a husband and wife filed suit under 42 U.S.C. § 1983, alleging that the police entered their house improperly to execute a search warrant, accompanied by members of the news media. After the officers entered, they handcuffed the husband, and the media was allowed to photograph him in this state, which caused him embarrassment and humiliation. 10 Med. L. Rptr. at 1620-21. After rejecting the claim that the search warrant was invalid, the District Court addressed the plaintiffs' claim that the officers had violated their "right to privacy under the Fourth Amendment by allowing the media to enter their premises along with the police officers and take photographs." *Id.* at 1621. The court found that these allegations did not state a proper claim for the deprivation of any constitutional right, for "the right to be free from unwanted publicity about one's affairs" is protected by the common law, not by the Fourth Amendment, and therefore such conduct does not fall within the "zone of privacy set out in the Constitution as being federally protected." *Id.* at 1622.

Similarly, in *Higbee*, the plaintiffs claimed that their constitutional rights were violated when law-enforcement officials invited the press to be present and to take photographs during the execution of a search warrant at plaintiffs' residence. A photograph of the inside of the residence was later published in the newspaper. 5 Med. L. Rptr. at 2372. Rejecting plaintiffs' claim, the District Court held that the constitutional "right to privacy" was not infringed except in cases "involving gross abuses." No such "gross abuse" or independent violation of the protected zone of privacy occurred, however, where police merely allowed members of the news media to observe and record the proper execution of a valid warrant. *Id.* The court dismissed the action, noting that plaintiffs' pendent claim for invasion of privacy under California tort law should be allowed to proceed in the state courts. *Id.* at 2373.

In *Prahl*, a television newscaster heard reports that a SWAT team was called to a residence where shots had been fired. He was allowed to join the officers and to observe and film their actions in entering the residence, confiscating the guns, and interviewing the suspect. A story on the incident ran

on the local television news later that day. The suspect, who was never charged, sued the officers and the newscaster under section 1983, alleging that his constitutional rights were violated "by an unreasonable search and seizure" and by "the filming and broadcasting of that search and seizure without his consent." 295 N.W.2d at 773-74. The trial court dismissed this claim, and the court of appeals affirmed, stating that it was "unwilling to accept the proposition that the filming and television broadcast of a reasonable search and seizure, without more, result in unreasonableness." *Id.* at 774. The court ruled, however, that plaintiff's claim for trespass against the officers and the newscaster would be permitted to proceed on remand to the trial court. *Id.* at 778-82.

These decisions establish that at the time petitioners acted, the courts had uniformly rejected claims that their actions violated the Fourth Amendment or any other provision of the Constitution.[12] *See also Scott v. State*, 559 So. 2d 269, 272 (Fla. App. 1990) (rejecting motion to suppress evidence where sheriff's deputies "permitted a television crew to enter the home during the execution of the warrant," finding no violation of the Fourth Amendment). Instead, allegations of injury to reputation or privacy interests stemming from such conduct were understood to be appropriately addressed under the common law in the state courts. *Cf. Paul v. Davis*, 424 U.S. 693, 699-712 (1976) (such matters are actionable under state tort law, not the Federal Constitution).

In addition, the media policy that was contained at the time in the United States Attorneys' Manual endorsed the practice of allowing officers to "assist the news media in photographing, taping, recording, or televising a law enforcement activity." *See* U.S. Dep't of Justice, *United States Attorneys' Manual*

[12] The court below brushed aside these contrary decisions by briskly declaring -- with no supporting legal or factual authority -- that there had been greater cooperation between the officers and the media in this case than in those three situations. *See* Pet. App. 12a-13a. This supposedly material observation is a classic distinction without a difference, as long as the media do not participate in the execution of the warrant.

§ 1-.000, section VII(B) (App.). As happened in this case, personnel who obtained approval from the U.S. Attorney's office were authorized to assist the news media in these ways in order to "promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence." *Id.* The existence of this policy reinforces the fact that the law at the time was not understood to establish, let alone "clearly establish," that petitioners' conduct was in violation of the Fourth Amendment.[13]

On the contrary, the existence of the Justice Department policy itself provides strong support for petitioners' claim that they are entitled to qualified immunity in this case. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (officers were entitled to qualified immunity for implementing established policy upheld in one previous case and never before held unconstitutional), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) (if officers "were simply implementing an established policy of the town, then they would have available to them a defense of qualified immunity from personal liability"); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) (qualified immunity is proper where officers followed longstanding, though unwritten, policy laid down by superiors and not found improper by any court), *cert. denied*, 451 U.S. 969 (1981).

[13] The media policy contained in the United States Attorneys' Manual is reprinted in relevant part in the Appendix to this brief. The relevant portion of the policy is section VII, entitled "Assisting the News Media." As set forth in the Appendix, the version in effect from January 14, 1993 to May 3, 1993 contained language allowing media observation and taping of *all* law enforcement activities, including the execution of a warrant. On May 3, 1993, however -- *postdating* the events of this case -- additional language was added that imposed new restrictions on media observation and taping of the execution of a warrant. *See* App. at A1-A2.

C. At the Time Petitioners Acted, No Court Had Ever Held that Their Conduct Violated the Fourth Amendment and Hence They Are Entitled to Qualified Immunity.

In fact, at the time petitioners acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful. All of the cases that the court below relied on for its constitutional analysis *postdated* their conduct. *See* Pet. App. 10a-13a. In this posture, the Ninth Circuit could not legitimately invalidate their defense of qualified immunity.

In particular, the court below relied on *Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 115 S. Ct. 1689 (1995), as holding that "even though there was then no reported decision expressly forbidding agents from inviting the press into the home of the person searched, no reasonable officer could have thought it permissible." Pet. App. 11a. Even the District Court's ruling in *Ayeni* postdated the actions at issue here. *See Ayeni v. CBS*, 848 F. Supp. 362 (E.D.N.Y. 1994).

On the basis of the Court's square holding in *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985), this reliance on subsequent decisions is improper and requires reversal. In that case, as here, the plaintiff alleged a violation of his constitutional rights based on the Fourth Amendment. The specific complaint in *Mitchell* was that federal officials had wrongfully authorized a wiretap on the plaintiff's telephone. Two years after those actions had taken place, the Supreme Court had ruled that such conduct was unlawful and violated the Fourth Amendment. *See United States v. United States Dist. Ct.*, 407 U.S. 297 (1972). At the time of the acts at issue, however, only two courts had addressed it. Both were federal district courts, and both had upheld the legality of the wiretaps in unpublished opinions. *See Mitchell*, 472 U.S. at 533 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972); *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972)). Within days after the officials authorized the wiretap challenged

in *Mitchell*, two other federal courts had held such conduct to be illegal, but those decisions postdated the events in question. *See* 472 U.S. at 533.

Accepting the federal officials' defense of qualified immunity, the Court held that in light of the two unpublished decisions extant at the time, to say that the contrary position "had already been 'clearly established' is to give that phrase a meaning that it cannot easily bear." *Mitchell*, 472 U.S. at 535. Under *Harlow*, "officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted," for this "hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Id.* "The decisive fact is not that Mitchell's position turned out to be incorrect, but that the question was open at the time he acted," as shown by the fact that the Supreme Court itself intervened to decide the issue two years later. *Id.*

The holding in *Mitchell* is decisive in favor of petitioners' claim to qualified immunity in this case.[14] Several decisions at the time had rejected claims that such conduct violated federal constitutional rights, and no decision had accepted such a claim. The Court has granted a writ of *certiorari* to address the issue for the first time in this case and in *Wilson v. Layne*, No. 98-83. And the Court has repeatedly admonished the lower courts that public officials "cannot be expected to predict the future course of constitutional law." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978). When the Ninth Circuit last departed from this admonition, this Court summarily reversed, emphasizing again that "[t]he qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*

---

[14] *See also Parker v. Boyer*, 93 F.3d 445, 447 (8th Cir. 1996) (pointing out that because the *Ayeni* decision was not rendered until "after the police in this case executed their search, [it] cannot weigh in the balance against a finding of qualified immunity"), *cert. denied*, 117 S. Ct. 1081 (1997); *Wilson*, 141 F.3d at 117 ("Reliance on decisions issued after the events underlying this litigation, whether the decisions were decided by this court or others, is inappropriate.") (citing *Mitchell*).

v. Bryant, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley*, 475 U.S. at 343, 341). The availability of a defense of qualified immunity is equally clear in this case.

D. It Has Long Been Common Practice to Allow News Media to Accompany and Observe Officers' Law Enforcement Activities.

The total absence of precedent upholding respondents' constitutional claim as of March 1993 is reinforced by the fact that it has long been a common and accepted practice to allow media to accompany officers in order to observe and record their law enforcement activities. *See, e.g.*, Richard Zoglin, *Live on the Vice Beat*, TIME, Dec. 22, 1986, at 60 (referring to "the increasingly common practice of letting TV crews tag along on drug raids").

For example, in *Florida Publishing Co. v. Fletcher*, 340 So. 2d 914 (Fla. 1976), *cert. denied*, 431 U.S. 930 (1977), a house caught on fire while the owner was absent. The police and fire departments responded to a call from a neighbor and extinguished the blaze, but not until after a child was killed. "When the Fire Marshal and Police Sergeant Short entered the house to make their official investigation, they invited the news media to accompany them, as they deposed was their standard practice." *Id.* at 915. The media representatives accompanied the officers into the home, observed the investigation, and took several pictures that were used in the investigation and also served as the basis for a later story in the local newspaper. Plaintiff, the owner of the house, learned about the fire and the death of her daughter by reading the newspaper story and viewing the published photographs. *Id.* at 915-16. She sued the newspaper for trespass, invasion of privacy, and intentional infliction of emotional distress. The underlying events occurred in 1972.

The trial court granted summary judgment for the newspaper on the trespass claim, noting that there was implied consent to the entry based on common custom and usage. In particular:

> "Not only did the Fire Marshal and Detective Sergeant Short testify that it was common custom and usage to permit the news media to enter under the circumstances here, and of the great number of times they had permitted it in private homes, but many affidavits were filed to the same effect, including those of Duval County Sheriff Carson and Florida Attorney General Shevin."

Id. at 916 (quoting trial court opinion). In addition, similar affidavits were filed by the Associated Press, United Press International, several television stations, and more than a dozen newspapers nationwide, "all attesting that it is common usage, custom and practice for news media to enter private premises and homes under circumstances like those here." *Id.* at 916-17.

The court of appeals reversed the grant of summary judgment on the trespass claim and remanded for trial. On further review, the Florida Supreme Court reinstated the trial court's grant of summary judgment for defendant, stressing the invitation to enter by the officers, and concluding:

> The question of implied consent to news media personnel to enter premises in a circumstance such as this appears to be one of first impression not only in this jurisdiction but elsewhere. This, in itself, tends to indicate that the practice has been accepted by the general public since it is a widespread practice of long-standing.

Id. at 918-19 (quotation omitted).

Various other state courts have since rejected the holding of the *Fletcher* case on the implied consent issue. *See, e.g.*, *Anderson*, 441 N.Y.2d at 227 (granting summary judgment to plaintiffs and holding that implied consent by custom and practice is no defense to trespass claim); *Prahl*, 295 N.W.2d at 780 (denying summary judgment and refusing as a matter of law to imply consent from custom and practice). But the important point here is not the details of state trespass law; it is the fact that the practice of news media accompanying officers

onto private premises as they investigate crimes and newsworthy events has been widespread in this country for at least 25 years. Indeed, on remand in the *Prahl* case, the trial court concluded on the basis of further submissions that in 1982 "'a common and accepted custom [existed] in the State of Wisconsin and nationally for reporters and photographers to accompany public officers and firemen onto private premises where newsworthy events of general public interest such as crime, shootings, fires or storms have or are occurring.'" MARC A. FRANKLIN & DAVID A. ANDERSON, CASES AND MATERIALS ON MASS MEDIA LAW 397 (5th ed. 1995) (quoting trial court opinion on remand).

This history of media ride-alongs, coupled with the extensive case law that had considered and addressed the practice without ever finding that it violated the Constitution, *see supra* Parts IE & 2B (citing and discussing cases), reinforces the inevitable conclusion that the law was not "clearly established" against the validity of such conduct at the time petitioners acted in this case.

E. Relevant Decisions and the Debate in this Case Show that It Is Not Evident, Even Now, that Petitioners Violated the Fourth Amendment.

It is also pertinent that the proper resolution of the Fourth Amendment issue presented in this case plainly is not obvious, even today, to many of the federal and state judges who have grappled with it. The most direct indication of this uncertainty is the Court's decision to grant *certiorari* and decide the Fourth Amendment issue in this case and in the *Wilson* case, which spawned sharply conflicting decisions in the courts below.[15]

---

[15] In *Wilson*, the District Court found that the officers had violated the Fourth Amendment and rejected their defense of qualified immunity, but a panel of the Fourth Circuit reversed, and the full court sitting *en banc* agreed with the panel. *See Wilson*, 141 F.3d at 113. In this case, the District Court accepted petitioners' defense of qualified immunity, judging that the law was still evolving on the Fourth Amendment issue, but a panel of the Ninth Circuit reversed, and the full court declined to rehear the case *en banc*.

See Mitchell, 472 U.S. at 534 (finding it significant for purposes of qualified immunity that "this Court found the issue sufficiently doubtful to warrant the exercise of its discretionary jurisdiction" to decide it and give it "the definitive answer that it demanded"). And Part I, *supra*, discusses in greater detail all the reasons why petitioners' conduct does not violate the Fourth Amendment at all.

The lower courts are still divided on the underlying constitutional issue, six years after the events of this case. In *Parker v. Boyer*, 93 F.3d 445 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1081 (1997), the panel split on the issue. The two Judges Arnold held that it was not "self-evident that the police offend general fourth-amendment principles when they allow members of the news media to enter someone's house during the execution of a search warrant." *Id.* at 448. Judge Rosenbaum, concurring separately, concluded that admitting representatives of the news media into the home without securing the resident's express consent did violate the Fourth Amendment. *Id.* at 448 (Rosenbaum, J., concurring). But all three judges found that the officers were entitled to qualified immunity, since even the most recent decisions "would appear to us to indicate at most only the beginnings of a trend in the law." *Id.* at 447 (majority opinion).

Similarly, in *Wilson*, the majority of the *en banc* court stated that "reasonable jurists can differ" on the Fourth Amendment issue posed in this case. 141 F.3d at 117. They noted, in particular, that "reasonable officers may have perceived that permitting the reporters to accompany them served a legitimate law enforcement function." *Id.* at 118. Judge Murnaghan and the other dissenting judges strenuously disagreed, though they acknowledged that the U.S. Marshals Service actually had in effect at the time a "media ride-along policy" that governed situations where members of the news media would accompany officers to observe and report on their actions. *Id.* (Murnaghan, J., dissenting).

Other courts have now held that law enforcement officers violate the Fourth Amendment when they allow members of the

news media to accompany them and to observe and record their execution of a warrant. *See, e.g., Hagler v. Philadelphia Newspapers, Inc.*, 1996 WL 408605, Civ. No. 96-2154 (E.D. Pa. July 12, 1996). These courts agree with the Second Circuit's holding in *Ayeni* that officers violate the Fourth Amendment when they bring into the home third parties who are "neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there," in order "to magnify needlessly the impairment of their right of privacy." 35 F.3d at 686. As discussed in Part IE, *supra*, however, it is far from clear that the presence of news media cannot reasonably be judged to serve a "legitimate law enforcement purpose."[16] Moreover, the court's conclusion in *Ayeni* that photographing or videotaping events which are in the officers' plain view amounts to a seizure under the Fourth Amendment, *see id.* at 688, is almost certainly incorrect, as explained more fully in Part IC, *supra*.

In addition, the *Ayeni* holding has been roundly criticized for having departed from this Court's treatment of qualified immunity claims by failing "to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms." *Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995). The *Ayeni* court had found that the law was "clearly established" because it has "long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties." 35 F.3d at 686. The *Bills* court commented that it is "hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard." 52 F.3d at 602. Such

[16] The Fourth Circuit was emphatic on this point in *Wilson*, stressing the importance of understanding "the distinction between an intent that the reporters assist in the actual execution of the warrant and a reasonable belief that permitting the reporters to accompany the officers served a legitimate law enforcement purpose." 141 F.3d at 118.

generalization of the Fourth Amendment would reduce the doctrine of qualified immunity to "a mere rule of pleading." *Id.*

This criticism is consistent with the Court's precedents governing the application of qualified immunity. In *Anderson*, the Court noted that operation of the qualified immunity standard greatly depends upon the level of generality at which the relevant "legal rule" is identified. 483 U.S. at 639. The Court cautioned that a plaintiff who alleges a constitutional tort cannot circumvent the plainly established rule of qualified immunity simply by alleging violations of extremely abstract rights. For example, "the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates the Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right." *Id.* To define the contested rights at an abstract level of generality thus would eviscerate the important protections that the Court affords through the doctrine of qualified immunity. *Id.*

In this situation, the doctrine of qualified immunity is designed to allow public officials to carry out their duties with "the decisiveness and the judgment required by the public good." *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). Only by faithful application of these settled principles can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages" and tailor their behavior accordingly. *Scherer*, 468 U.S. at 195. Once again, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. In the circumstances at issue here, petitioners cannot plausibly be placed in either category. *See Bills*, 52 F.3d at 603 ("The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined.").[17]

[17] As the Court has said about the "fair notice" requirement in the criminal law, the situation here is one where "disparate decisions in various Circuits might leave the law insufficiently certain" to be "clearly established." *United States v. Lanier*, 117 S. Ct. 1219, 1226-27 (1997).

Only by upholding petitioners' defense of qualified immunity would the Court remain faithful to its consistent warning that public officials are not required and "cannot be expected to predict the future course of constitutional law." *Procunier*, 434 U.S. at 562. That would be precisely the effect if the Court were to reject petitioners' defense of qualified immunity here. Particularly where -- as here and as in *Mitchell* -- there is no preexisting authority that clearly establishes the law one way or the other, and other lower court decisions had uniformly held that such conduct was lawful, this landscape should be the decisive factor which requires the defense of qualified immunity to be upheld.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded with instructions to dismiss the *Bivens* claim brought against petitioners.

Respectfully submitted,

RICHARD A. CORDRAY
Counsel of Record
ANDREW B. CLUBOK
JAMES A. ANZELMO
4900 Grove City Road
Grove City, Ohio 43123
(614) 539-1661

Attorneys for Petitioners

December 1998

APPENDIX

APPENDIX

U.S. Department of Justice, *United States Attorneys' Manual* § 1-7.000 (Media Policy) (as amended Jan. 14, 1993), stated as follows:

1-7.000

MEDIA POLICY

The purpose of this policy statement is to establish specific guidelines consistent with the provisions of 28 CFR 50.2 governing the release of information relating to criminal and civil cases and matters by all components (FBI, DEA, INS, BOP, USMS, USAO, and DOJ divisions) and personnel of the Department of Justice.

* * *

VII. ASSISTING THE NEWS MEDIA

A. Other than by reason of a Court order, Department personnel shall not prevent the lawful efforts of the news media to photograph, tape, record or televise a sealed crime scene from outside the sealed perimeter.

B. In order to promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence, Department personnel with the prior approval of the appropriate United States Attorney may assist the news media in photographing, taping, recording or televising a law enforcement activity. The United States Attorney shall consider whether such assistance would:

1. unreasonably endanger any individual;

2. prejudice the rights of any party or other person; and

3. is not otherwise proscribed by law.

C. A news release should contain a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[end of Section VII]

* * *

[end of Policy]

** *A further amendment to the policy, dated May 3, 1993, stated as follows:*

Please insert the additional language in your United States Attorneys' Manual at 1-7.000, VII. D.

VII. ASSISTING THE NEWS MEDIA

D. In cases in which a search warrant or arrest warrant is to be executed, no advance information will be provided to the news media about actions to be taken by law enforcement personnel, nor shall media representatives be solicited or invited to be present. This prohibition will also apply to operations in preparation for the execution of warrants, and to any multi-agency action in which Department personnel participate.

If news media representatives are present, Justice Department personnel may request them to withdraw voluntarily if their presence puts the operation or the safety of individuals in jeopardy. If the news media declines to withdraw, Department personnel should consider cancelling the action if that is a practical alternative.

Exceptions to the above policy may be granted in extraordinary circumstances by the Office of Public Affairs.

[end of amendment]